

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MARTHA TORRES and JORGE  
ALBERTO ALMARAZ TREJO,

Plaintiffs,

vs.

JOHN KERRY, Secretary of State,

Defendant.

CASE NO. 12-CV-2309-LAB (JMA)

**ORDER DISMISSING CASE FOR  
LACK OF SUBJECT MATTER  
JURISDICTION**

Plaintiffs are husband and wife. Martha lives in the United States, and Jorge lives in Mexico. Jorge applied for a visa to move to the United States and made it as far as an interview with a consular officer in Ciudad Juarez. His application was denied, however, because a 1974 conviction in the United States for drug trafficking gave the officer a reason to believe Jorge “is or has been an illicit trafficker in any controlled substance.” 8 U.S.C. § 1182(a)(2)(C)(i).

Martha and Jorge challenge that denial on the ground that Jorge’s conviction was set aside in 1979 under the Federal Youth Corrections Act, which they take to mean it cannot be used against him in any way, including in the immigration context. And they have some authority on their side. See, e.g., *Matter of Zingis*, 14 I. & N. Dec. 621, 625 (BIA 1974) (“Under the provisions of the Federal Youth Corrections Act, the conviction, when it is set

1 aside, is totally set aside. It may not be used in any way. It is a greater remedy than a  
 2 pardon.”).

3 The biggest problem for Martha and Jorge is jurisdictional: the doctrine of consular  
 4 nonreviewability insulates the decisions of consular officers from review. And the doctrine  
 5 is well-established:

6 The doctrine of nonreviewability of a consul’s decision to grant  
 7 or deny a visa stems from the Supreme Court’s confirming that  
 8 the legislative power of Congress over the admission of aliens  
 9 is virtually complete . . . . [I]t has consistently been held that the  
 10 consular official’s decision to issue or withhold a visa is not  
 subject either to administrative or judicial review. . . . Exercising  
 jurisdiction over this case would, therefore, violate the long-  
 recognized judicial nonreviewability of a consul’s decision to  
 grant or deny a visa.

11 *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 970–71 (9th Cir. 1986). Martha and Jorge  
 12 try to get around this by arguing that the Court *can* review a decision when, as here, the  
 13 claim is that it’s based on legal error. That’s not really their argument, though, and if it were  
 14 it would be a miss. See *Loza-Bedoya v. Immigration and Naturalization Service*, 410 F.2d  
 15 343, 347 (9th Cir. 1969) (“Though erroneous this Court is without jurisdiction to order an  
 16 American consular official to issue a visa to any alien whether excludable or not.”); *Chun v.*  
 17 *Powell*, 223 F.Supp.2d 204, 206 (D.D.C. 2002) (holding that consular nonreviewability  
 18 applies “where the decision is alleged to have been based on a factual or legal error”).

19 What *is* Martha and Jorge’s argument, then? It is that the consular official had no  
 20 facially legitimate or bona fide reason to deny Jorge’s visa application. Some background  
 21 law is necessary here. There are some exceptions to consular nonreviewability, one of  
 22 which arises “when the government has denied a visa if the government did not act ‘on the  
 23 basis of a facially legitimate and bona fide reason.’” *Patel v. Reno*, 134 F.3d 929, 932 n.1  
 24 (9th Cir. 1997) (*quoting Kleindienst v. Mandel*, 408 U.S. 753 (1972)). The Ninth Circuit  
 25 subsequently made clear that this exception is only triggered “where the denial of a visa  
 26 implicates the constitutional rights of American citizens.” *Bustamante v. Mukasey*, 531 F.3d  
 27 1059, 1060 (9th Cir. 2008). For example, in *Mandel* the right at issue that triggered judicial  
 28 review was the First Amendment right of American university professors to “receive

1 information and ideas" from a Belgian advocate of world communism who they'd invited to  
 2 speak on various campuses. *Kleindienst*, 408 U.S. at 762. In such a scenario, there may  
 3 be a "highly constrained" or "limited" judicial inquiry, but "[a]s long as the reason given is  
 4 facially legitimate and bona fide the decision will not be disturbed." *Id.* at 1060–62.

5 A preliminary question, then, is whether the denial of Jorge's visa implicates Martha's  
 6 constitutional rights. Under *Bustamante*, which is roughly identical to this case, it seems that  
 7 it does: "Freedom of personal choice in matters of marriage and family life is, of course, one  
 8 of the liberties protected by the due process clause." *Bustamante*, 531 F.3d at 1062. But  
 9 Defendant urges the Court not to follow *Bustamante* because it appears to conflict with  
 10 earlier Ninth Circuit caselaw, didn't address that earlier caselaw, and wasn't itself an en banc  
 11 decision with the authority to overrule that caselaw. See *Morales-Izquierdo v. Dep't of*  
 12 *Homeland Sec.*, 600 F.3d 1076, 1091 (9th Cir. 2010) ("In short, lawfully denying Morales  
 13 adjustment of status does not violate any of his or his family's substantive rights protected  
 14 by the Due Process Clause.").

15 On top of that, the Court notes that other district courts have expressly declined to  
 16 follow *Bustamante* because it is contrary to the law of their circuits. See, e.g., *Ruiz-Herrera*  
 17 *v. Holder*, 2013 WL 1136849 at \*4 (N.D. Ga. Mar. 15, 2013) ("But numerous courts have  
 18 held that neither deportation nor denial of a spouse's immigrant visa infringes upon that  
 19 freedom."); *Jathoul v. Clinton*, 880 F.Supp.2d 168, 171–72 (D.D.C. 2012) ("While it may well  
 20 be true that exclusion of her husband imposes burdens on their married life, the Court  
 21 cannot find any constitutional violation."); *Gogilashvili v. Holder*, 2012 WL 2394820 at \*5  
 22 (E.D.N.Y. June 25, 2012) ("No constitutional right of a citizen spouse is violated by  
 23 deportation or denial of a visa application of his or her alien spouse."). See also *Bangura*  
 24 *v. Hansen*, 434 F.3d 487, 496 (6th Cir. 2006) ("A denial of an immediate relative visa does  
 25 not infringe upon their right to marry.").

26 There is a nuance to *Bustamante*, however, that Defendant misses in urging the Court  
 27 to disregard it—and that at least one district court in the Ninth Circuit has deftly highlighted.  
 28 See *Boyal v. Napolitano*, 2011 WL 864618 at \*4 (E.D. Cal. Mar. 10, 2011). The plaintiffs in

1     *Bustamante*—a Mexican husband whose application for a permanent resident visa was  
 2 denied, and his American wife—alleged a *procedural* due process violation, in essence by  
 3 claiming the visa denial was in bad faith. The husband’s visa was denied, they claimed,  
 4 because he refused to become an informant for the Drug Enforcement Agency.  
 5 *Bustamante*, 531 F.3d at 1061. Moreover, a consular officer said he had reason to believe  
 6 the husband was a drug trafficker under § 1182(a)(2)(C)(I) but refused to share the  
 7 information upon which this belief was based. *Id.* at 1060. It is in this context—the assertion  
 8 of a procedural due process right—that the Ninth Circuit found in *Bustamante* that the limited  
 9 inquiry authorized by *Mandel* was appropriate: “Presented with a procedural due process  
 10 claim by a U.S. citizen, we therefore consider the Consulate’s explanation for the denial of  
 11 Jose’s visa application pursuant to the limited inquiry authorized by *Mandel*.” *Id.* at 1062.  
 12 The many cases cited by Defendant to urge this Court to veer off course from *Bustamante*  
 13 appear to address, instead, the lack of a *substantive* due process interest that a resident  
 14 spouse has in the visa application of an alien spouse.

15       The point here is simply that the Defendant doesn’t need to argue that *Bustamante*  
 16 was wrongly decided or inconsistent with Ninth Circuit precedent. He can argue instead that  
 17 it is distinguishable from this case (and from precedent) because it implicated a *procedural*  
 18 rather than a *substantive* due process interest. This is how Judge England handled  
 19 *Bustamante* in *Boyal*. *Boyal*, 2011 WL 864618 at \*4 (“In . . . *Bustamante* . . . the  
 20 plaintiffs . . . did not claim a substantive due process protection for their right to reside  
 21 together as spouses, but merely for constitutionally adequate procedures before the  
 22 government denies that right.”). Judge England reasoned, in other words, that constitutional  
 23 rights are only implicated in this context, and review under *Mandel* triggered, when the claim  
 24 is that the denial of visa was procedurally defective. If, instead, a plaintiff simply objects to  
 25 the conclusion the consular office reached, the claim is substantive and *not* constitutionally  
 26 cognizable—and *Mandel* review is *not* triggered.

27       So what kind of claim are Martha and Jorge advancing, a procedural or substantive  
 28 one? The Court sees it as substantive. The consular officer, in their eyes, made an

1 erroneous decision that deprived them of the ability to live together. The interest they assert  
 2 isn't a procedural one, but rather Martha's "personal choice to want to live with her husband  
 3 in the United States," which they claim "is protected by the Due Process Clause and gives  
 4 this Court jurisdiction." (Doc. No. 6 at 7.) That is a substantive claim, and a mistaken one  
 5 at that. *Morales-Izquierdo*, 600 F.3d at 1091. Considering that no constitutional rights are  
 6 implicated here, the Court finds it has no jurisdiction to review the consular officer's denial  
 7 of Jorge's visa application. See *Boyal*, 2011 WL 864618 at \*5. This means that Martha and  
 8 Jorge aren't even entitled to the *Mandel* inquiry that asks whether the officer's decision was  
 9 based upon a facially legitimate or bona fide reason. The Defendant's motion to dismiss for  
 10 lack of jurisdiction is therefore **GRANTED**.

11 Even assuming the Court has jurisdiction here, it would find that the consular officer's  
 12 decision was facially legitimate and bona fide. The reason given for the decision—the belief  
 13 that Jorge was a drug trafficker—is indisputably a statutory basis for inadmissibility, and  
 14 therefore "plainly a facially legitimate reason." *Bustamante*, 531 F.3d at 1062; 8 U.S.C.  
 15 § 1182(a)(2)(C)(i). And in arguing that the consular officer's decision reliance on Jorge's  
 16 1974 conviction was legally erroneous, Martha and Jorge are as much as conceding that *that*  
 17 was the true basis of his decision, rather than some other, unspoken motive. There is no  
 18 allegation here that the consular officer acted in bad faith such that his given reason for the  
 19 decision was not his true, bona fide reason. *Bustamante*, 531 F.3d at 1062. Finally, the only  
 20 circuit to recently address head-on the question whether a conviction expunged by the  
 21 Federal Youth Corrections Act can still be the basis for denying an alien admission has held  
 22 that it can:

23 Because expunction does not entitle its recipient to the  
 24 concealment of a conviction, neither does it conceal the facts  
 25 underlying a conviction. Expunction means that *the conviction*  
 26 *itself* will not stand as an impediment to a youthful offender in  
 the near future. We conclude that expunction does not entitle  
 petitioner to secret the fact of his conviction, or the facts  
 underlying that conviction, from immigration officials.

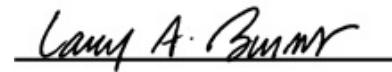
27 *Castano v. I.N.S.*, 956 F.2d 236, 239 (11th Cir. 1992). The Ninth Circuit has cited *Castano*  
 28 in finding that the facts underlying a conviction expunged under the Federal Youth

1 Corrections Act are relevant to a “good moral character” determination for naturalization  
2 purposes. *United States v. Hovsepian*, 359 F.3d 1144, 1159 (9th Cir. 2004). These are just  
3 some additional reasons, but by no means necessary ones, to find that Martha and Jorge’s  
4 complaint fails to state a claim upon which relief can be granted. This case is **DISMISSED**  
5 **WITH PREJUDICE.**

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7 **IT IS SO ORDERED.**

8 DATED: April 3, 2013

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10 HONORABLE LARRY ALAN BURNS  
11 United States District Judge

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